

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL
74-2287

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

In the Matter of

HAROLD A. LIPTON and IRVING
LEVIN,

Plaintiffs-Appellants,

-against-

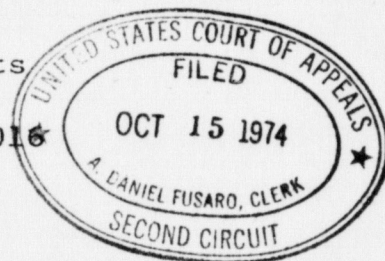
ROBERT J. SCHMERTZ,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANTS' APPENDIX - VOL. II

ROBERT P. HERZOG
Attorney for Appellants
185 Madison Avenue
New York, New York 10016
(212) 725-0001



5

TABLE OF CONTENTS

	<u>Page</u>	<u>Record</u>
CERTIFIED COPY OF JUDGMENT	1A	1
DEFENDANT'S ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER	4A	2
AFFIDAVIT ANNEXED TO OCS	7A	2
MEMORANDUM OPINION, MOTLEY, J.	12A	4
ORDER OF MOTLEY, J.	15A	5
NOTICE OF APPEAL	18A	6

RELEVANT DOCKET ENTRIESHAROLD A. LIPTON & IRVING H. LEVIN v. ROBERT J. SCHMERTZM 18-302, Judgment # 74,733.

<u>Date</u>	<u>Proceedings</u>
9/11/74	Filed certified copy of judgment obtained in the Central Dist. of Calif.--in favor of plaintiffs in the sum of \$250,000., plus interest at the rate of 7% from 8-7-72, in the sum of \$34,232.87., plus compensatory damages in the sum of \$3,435,000., and \$500,000., for punitive damages--Registered in this Court and docketed as judgment #74,733.
9/25/74	Filed deft's affdvt. & show cause order & Temporary restraining order--that said judgment not be registered in this Court until the appeal is final and to enjoin plttffs. from executing on said judgment-ret. 9-30-74--
9/25/74	Filed memorandum of law in support of motion.
10/01/74	Filed memorandum OPINION #41,246--motion of deft. Robert J. Schmertz to vacate registration in this District of a judgment of the USDC for the Central Dist. of Calif. is granted--Motion of plttffs.for a writ of attachment is denied--
10/01/74	Filed order that deft's motion to strike the registration in this Court of judgment obtained in the USDC for the Central Dist. of Calif is granted and such judgment is hereby stricken and the Clerk of this Court is hereby directed upon the filing of a copy of this Order to make appropriate entry on the records of this Court striking said registration of the judgment--plttffs' application for an order of attachment is denied-Motley,J.
10/01/74	Filed plttffs' notice of appeal--mailed copy to Reavis & McGrath.
10/09/74	Filed memorandum of law in support of defendant's motion to strike registration, etc.

CERTIFIED COPY OF JUDGMENTCERTIFICATE OF JUDGMENT FOR REGISTRATION

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HAROLD A. LIPTON and
IRVING H. LEVIN,

CIVIL ACTION
NO. 73 1303 R

Plaintiffs,

JUDGMENT

-against-

ROBERT J. SCHMERTZ,

Defendant.

CERTIFICATE OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

I, EDWARD M. KRITZMAN, Clerk of the United States District Court for the Central District of California do hereby certify the annexed to be a true and correct copy of the original judgment entered in the above entitled action on July 25, 1974, as it appears of record in my office, and that *a notice of appeal from said judgment was filed in my office on August 12, 1974. To date, no stay of execution of said judgment has been filed or entered.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said Court this 5th day of September, 1974.

_____, Clerk

By ANDREW H. NELSON Deputy Clerk

*When no notice of appeal from the judgment has been filed, insert "no notice of appeal from the said judgment has been filed in my office and the time for appeal commenced to run on (insert date) upon the entry of (If no motion of the character described in Rule 73(a) F.R.C.P. was filed, here insert "the judgment", otherwise describe the nature of the order from the entry of which time for appeal is computed under that rule.) If an appeal was taken, insert "a notice of appeal from the said judgment was filed in my office on (insert date) and the judgment was affirmed by mandate of the Court of Appeals issued (insert date) or "a notice of appeal from the said judgment was filed in my office on (insert date) and the appeal was dismissed by the (insert "Court of Appeals" or "District Court") on (insert date)", as the case may be.

CERTIFIED COPY OF JUDGMENT

Entered and Filed
July 25, 1974
Clerk U.S. District Court
Central District of California
By

Deputy

JUDGMENT ON THE VERDICT
(FOR PLAINTIFFS)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

-----x

HAROLD A. LIPTON and IRVING H.
LEVIN,

Plaintiffs,

CASE NO. 73-1303-R

vs.

JUDGMENT ON THE VERDICT
(FOR PLAINTIFFS)

ROBERT J. SCHMERTZ,

Defendant.

-----x

This case having been tried by the Court and a
Jury, before the Honorable Manuel L. Real, Jr.,
judge presiding, and the issues having been duly
tried, and the Jury having duly rendered its verdict;
now therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that defendant,
ROBERT J. SCHMERTZ, pay to plaintiffs, HAROLD A. LIPTON
and IRVING H. LEVIN, compensatory damages in the sum of

CERTIFIED COPY OF JUDGMENTJUDGMENT ON THE VERDICT
(FOR PLAINTIFFS)

\$250,000, plus interest at the rate of 7% from August 7, 1972, in the amount of \$34,232.87, plus compensatory damages in the sum of \$3,435,000; and that defendant, ROBERT J. SCHMERTZ, pay to plaintiffs, HAROLD A. LIPTON and IRVING H. LEVIN, punitive damages in the sum of \$500,000;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said plaintiffs, HAROLD A. LIPTON and IRVING H. LEVIN, have and recover costs from the said defendant, ROBERT J. SCHMERTZ, taxed in the sum of \$1,814.70.
Dated: July 25, 1974.

United States District Court Judge

7/31/74 fixed costs in sum of \$1,814.70 against
Deft.

I hereby attest and certify on August 28, 1974
that the foregoing document is a full, true and
correct copy of the original on file in my office
and in my legal custody.

Clerk U.S. District Court
Central District of California

BY _____ Deputy

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
HAROLD A. LIPTON and IRVING
LEVIN,

Index No. M 18-302(1974)

Plaintiffs,

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER

-against-

ROBERT J. SCHMERTZ,

Defendant.
-----x

Upon the reading and filing of the affidavit of James Nespole sworn to the 24th day of September, 1974, and the exhibits attached thereto, it is

ORDERED that the plaintiffs herein, Harold A. Lipton and Irving Levin, show cause at a Motion Term of this Court, to be held in Room 506, United States Court House, Foley Square, New York, New York, on the 30th day of September, 1974, at 2:00 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why an Order should not be made herein pursuant to 28 U.S.C. §1963 (1958) striking the registration

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER

in this Court of a judgment in the above-captioned action entered in the United States District Court, Central District of California, and ordering that said judgment not be registered in this Court until the appeal therefrom is final and restraining and enjoining plaintiffs from executing on said judgment or serving restraining notices or subpoenas or proceeding on restraining notices or subpoenas previously served, examining the defendant or non-party witnesses, or in any way interfering with defendant's property, and why applicant should not have such other and further relief as is just and proper, and it is further

ORDERED, that pursuant to FRCP 65(b) plaintiffs are, pending the hearing on the instant motion, restrained from attempting to execute on said judgment, serving any further restraining notices or information subpoenas, or by further proceeding on restraining notices or subpoenas previously served and further examining the defendant or non-party witnesses, or in any other way further

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER

interfering with defendant's property, and it is further

ORDERED, that service of a copy of this Order and the affidavit upon which it is granted be made by personal service on Robert P. Herzog, attorney for plaintiffs, on or before the 25th day of September, 1974, at 3:00 P.M. shall be deemed sufficient.

Dated: September 24, 1974

CBM

United States District Judge

ISSUED

PART I

AFFIDAVIT IN SUPPORT OF AN APPLICATION
FOR AN ORDER TO SHOW CAUSE AND A
TEMPORARY RESTRAINING ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

HAROLD A. LIPTON and IRVING
LEVIN,

Plaintiffs,

-against-

ROBERT J. SCHMERTZ,

Defendants.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

Index No. M 18-302(1974)

AFFIDAVIT IN SUPPORT OF AN
APPLICATION FOR AN ORDER TO
SHOW CAUSE AND A TEMPORARY
RESTRAINING ORDER

JAMES NESPOLE, being duly sworn, deposes and
says:

1. I am an associate of the firm of Reavis &
McGrath, attorneys for the defendant in the above-
captioned action, and am fully familiar with the
facts set forth herein. I submit this affidavit in
support of Defendant's application for a Temporary
Restraining Order and an Order to Show Cause why the
registration in this Court of a judgment entered in

AFFIDAVIT IN SUPPORT OF AN APPLICATION
FOR AN ORDER TO SHOW CAUSE AND A
TEMPORARY RESTRAINING ORDER

the United States District Court, Central District of California obtained by plaintiffs should not be stricken. The ground for this application is that an appeal from said judgment is pending and therefore the judgment cannot be registered in this Court.

2. On or about June 8, 1973, plaintiffs herein brought an action for breach of contract in the United States District Court, Central District of California. On July 25, 1974, a judgment therein was entered for the plaintiffs in the amount of \$4,221.047.57.

3. On August 21, 1974, an appeal from said judgment was taken, and a Notice of Appeal was duly filed with the Clerk of the United States District Court, Central District of California. Said appeal is still pending.

4. On September 11, 1974, plaintiffs registered a Certification of said judgment with the Clerk of this Court (a copy of the Certification is annexed hereto as Exhibit "A"). The registration of the

AFFIDAVIT IN SUPPORT OF AN APPLICATION
FOR AN ORDER TO SHOW CAUSE AND A
TEMPORARY RESTRAINING ORDER

judgment was in clear violation of 28 U.S.C.D. §1963 (1958). The statute provides that only a final judgment - one not on appeal - can be registered in this Court. The operative language of the statute is that a judgment "...which has become final by appeal or expiration of time for appeal may be registered..." The plaintiffs have acted with complete disregard for the statute. The Clerk of the California Court's Certification of the judgment clearly states that "...a notice of appeal from said judgment was filed in my office on August 12, 1974", but the Certification does not state that the appeal has been determined or dismissed as is required and nor could it since the appeal is still pending.

5. The plaintiffs' violation of §1963 has harrassed and embarrassed the defendant in the operation of his financial affairs. Plaintiffs,

AFFIDAVIT IN SUPPORT OF AN APPLICATION
FOR AN ORDER TO SHOW CAUSE AND A
TEMPORARY RESTRAINING ORDER

in an attempt to execute here in New York on a non-final judgment, have served 3 Restraining Notices (with Information Subpoenas). On September 13, 1974, a Restraining Notice was served on Morgan Guaranty Trust Company, and a Restraining Notice was served on the New York Stars. Copies of said Restraining Notices are annexed hereto as Exhibits "B" and "C" respectively. Also, on September 16, 1974 a Restraining Notice and Information Subpoena was served on the New York office of The First National Bank of Boston.

6. The plaintiffs' misuse of the registration process has greatly prejudiced the defendant. For example, in a letter dated September 17, 1974, Morgan Guaranty Trust Company advised the defendant that it had placed "an embargo" on the funds in the defendant's account therein in the amount of \$8,442,095.14, twice the amount of plaintiffs' judgment. A copy of Morgan

AFFIDAVIT IN SUPPORT OF AN APPLICATION
FOR AN ORDER TO SHOW CAUSE AND A
TEMPORARY RESTRAINING ORDER

Guaranty's letter is attached hereto as Exhibit "D".

7. If the plaintiffs are allowed to improperly execute on the judgment while an appeal is pending the defendant will suffer irreparable injury.

8. No previous request for the relief sought herein has been made.

WHEREFORE, I respectfully request that upon the hearing of the instant motion that plaintiffs' registration of the California judgment be stricken, and that pending the hearing of this motion a temporary restraining order be entered restraining the plaintiffs from further attempting to execute on said judgment or in any other way interfere with defendant's property, and that this Court grant such further relief as it deems just and proper.

James Nespole

Sworn to before me this
24th day of September, 1974.

Stephen H. Lewis
Notary Public, State of New York
No. 24-4513433
Qualified in Kings County
Commission Expires March 30, 1975.

MEMORANDUM OPINION - MOTLEY, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
HAROLD A. LIPTON and
IRVING LEVIN,

Plaintiffs,

-against-

ROBERT J. SCHMERTZ,

Defendant.

----- x

M 18-302
Judgment #74,733

HAROLD A. LIPTON and IRVING H.
LEVIN,

Plaintiffs,

-against-

ROBERT J. SCHMERTZ,

Defendant.

----- x

74 CIV. 4211

APPEARANCES

ROBERT P. HERZOG
185 Madison Avenue
New York, New York 10016

Attorneys for Plaintiffs

REAVIS & McGRATH
By: James Nespolo
One Chase Manhattan Plaza
New York, New York 10005

CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION - MOTLEY, J.

The Motion of defendant Robert J. Schmertz to Vacate Registration in this District of a judgment of the United States District Court for the Central District of California is granted. The Motion of plaintiffs Harold A. Lipton and Irving H. Levin For Writ of Attachment is denied for the following reasons:

- 1) An appeal from the judgment of the United States District Court for the Central District of California is presently pending in the United States Court of Appeals for the 9th Circuit. Therefore, no registration of the judgment is permitted here under 18 U. S. C. § 1963.
- 2) The 9th Circuit has remanded to the District Court for hearing the question whether other sufficient security in lieu of the previously required \$3,000,000 supercedas bond should not be posted by defendant.
- 3) Plaintiffs' remedy is in the 9th Circuit by way of Motion to Dismiss the Appeal as Frivolous. As long as an appeal of substance is pending, § 1963 bars registration of the judgment in a foreign district.

MEMORANDUM OPINION - MOTLEY, J.

4) Since no registration is possible while an appeal is pending, plaintiffs cannot secure an attachment in this Court on a theory that they have brought an action in this Court for enforcement of that judgment. Such a writ would manifestly defeat the objective of § 1963.

Dated: New York, New York

SO ORDERED

September 30, 1974

CONSTANCE BAKER MOTLEY
U. S. D. J.

ORDER OF MOTLEY, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
HAROLD A. LIPTON and IRVING :
LEVIN, :
Plaintiffs, : Index No. M 18-302 (1974)
-against- :
ROBERT J. SCHMERTZ, : ORDER
Defendant. :
-----X

Upon the reading and filing of the Order to Show Cause issued on September 25, 1974, the affidavit of James Nespole in support thereof, sworn to September 24, 1974, and the exhibits annexed thereto, defendant's appendices A and B attached to defendant's memorandum of law, plaintiffs' proposed order of attachment and plaintiffs' separate appendix of Exhibits, and upon hearing the motion of Reavis & McGrath, attorneys for defendant, to strike the registration of a judgment of the United States District Court for the Central District of California pursuant to 28 U.S.C. §1963, and further, upon hearing plaintiffs' application for an order of attachment pursuant to F.R.C.P. §64 and N.Y. C.P.L.R. §6201, it is

ORDER OF MOTLEY, J.

ORDERED that the defendant's Motion to Strike the Registration in the Southern District of New York of the Judgment of the United States District Court for the Central District of California is granted and such Judgment is hereby stricken and the Clerk of this Court is hereby directed upon the filing of a copy of this Order to make the appropriate entry on the records of this Court striking the registration of the judgment of the United States District Court for the Central District of California and it is further

ORDERED that plaintiffs' application for an order of attachment is denied and plaintiffs' complaint seeking a judgment in the Southern District of New York based upon the judgment of the United States District Court for the Central District be stricken and it is further

ORDERED, that except as hereafter Ordered by the United States District Court for the Central District of California, or the United States Court of Appeals for the Ninth Circuit and except in the State of California, plaintiffs are hereby permanently restrained and enjoined pending the final determination

ORDER OF MOTLEY, J.

of defendant's appeal from the judgment entered in the United States District Court for the Central District of California on July 25, 1974 from attempting to attach or execute upon the defendant's property, wherever situated, serving restraining notices or information subpoenas, or taking any other action with respect to the judgment, including supplementary proceedings, or in any other way interfering or attempting to interfere with defendant's property or his use or control thereof or from attempting to interfere with such property that has been pledged to any lender of defendant or to take any action with respect to such lenders, and it is further

ORDERED, that service of a copy of this Order and memorandum be made by personal service on Robert P. Herzog, attorney for plaintiffs, on or before the 1st day of October, 1974, at 12:00 noon shall be deemed sufficient.

Dated: September 30, 1974

/S/ Constance Baker Motley
United States District Judge

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

HAROLD A. LIPTON and	:	
IRVING LEVIN,	:	
	:	
Plaintiffs,	:	M 18-302
	:	Judgment # 74,73
-against-	:	
	:	NOTICE OF APPEAL
ROBERT J. SCHMERTZ,	:	<u>TO COURT OF APPEALS</u>
	:	
Defendant.	:	

-----X

HAROLD A. LIPTON and IRVING H.	:	
LEVIN,	:	
	:	
Plaintiffs,	:	74 CIV. 4211
	:	
-against-	:	NOTICE OF APPEAL
	:	<u>TO COURT OF APPEALS</u>
ROBERT J. SCHMERTZ,	:	
	:	
Defendant.	:	

-----X

Plaintiffs hereby appeal to the United States Court of Appeals for the Second Circuit from each and every part of the memorandum of opinion and order entered by Honorable Constance Baker Motley, United States District Judge, on September 30, 1974,

A) striking the registration of a judgment of the United States District Court for the Central District of California pursuant to 28 U.S.C. 1963,

B) denying plaintiffs' application for an order of attachment and dismissing plaintiffs' complaint, and

NOTICE OF APPEAL

C) permanently restraining and enjoining the plaintiffs from attaching or executing upon defendants property or otherwise seeking to enforce its California judgment, pending appeal thereof.

The parties to such order appealed from and the names and addresses of their respective attorneys are set forth below.

Dated: New York, New York
October 1, 1974

ROBERT P. HERZOG
Attorney for the Plaintiffs
185 Madison Avenue
New York, New York 10016
(212) 725-0001

TO: REAVIS & McGRATH, ESQS.
1 Chase Manhattan Plaza
New York, New York 10005
(212) 269-7600
Attorneys for Defendant

Copy received October 15, 1974, 11: 25 A.M.

Reeson + Mc Keith

Attorneys for Defendant - Appellee
By Mary M. Bateman